Decision #92-027-I

IN THE MATTER OF THE HUMAN RIGHTS CODE, 1981
S.O. 1981, c. 53, As Amended

In the matter of a Complaint under the HUMAN RIGHTS CODE by Allen McKee, dated January 27, 1986, alleging discrimination in employment on the basis of age by Hayes-Dana Inc., R.O. Mossberger and Jack Yates.

BETWEEN:

Allen McKee

(The Complainant)

- and -

Hayes-Dana Inc.
R.O. Mossberger
Jack Yates

(The Respondents)

Board of Inquiry - Morley R. Gorsky

Appearances

For the Commission - G. Sanson
Counsel
John Hannaford Student at Law.

For the Respondents - T.R. Hawkins
Counsel

For Allen McKee - In person

Hearing: By conference call, Oct. 2, 1992

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TO: Geri Sanson	FROM: Morley Gorsky
CO.: Ont. Human Rights	CO.:
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INTERIM DECISION ON THE ISSUE OF MONETARY COMPENSATION

On April 22, 1992, the Board issued its decision in connection with the complaint of Allen McKee, dated January 27, 1986, filed with the Ontario Human Rights Commission, with respect to whether the Respondents had discriminated against him because of age in 1985, and whether he had done that which was reasonable to mitigate his loss. Mr. McKee, who had worked for Hayes-Dana for over 32 years, was a foreman in the forge shop on August 16, 1985 when his career with Hayes-Dana came to an end. The Board concluded that the complaint of discrimination on the basis of age had been made out (at p.21). At p.22 the Board ordered: "That the Respondent, Hayes-Dana Inc., compensate the Complainant Allen McKee, for lost wages and benefits from October 1, 1985 to the date of his 65th birthday," Mr. McKee having been 57 years of age on August 16, 1985. The Board also found (at pp.22-3), that Mr. McKee had made all reasonable efforts to obtain comparable employment and had mitigated his damages.

During the course of the hearing the Board was primarily concerned with the issue of whether the complaint of discrimination on the basis of age had been established. There were many potentially complex issues relating to the nature and extent of the monetary compensation that might be ordered to be paid to Mr. McKee in the event of a finding in his favour. In order not to unnecessarily prolong the hearing, the Board wished first to

address the issue of whether there had been a breach of Mr. McKee's rights under the Human Rights Code, 1981 S.O. 1981, c.53, as amended (the "Code").

At p.23 of the decision, the Board stated:

> I wish to afford the parties an opportunity to arrive at a mutually agreeable amount to be payable under the order for payment of lost wages and benefits. Should they be unable to do so, I will reconvene the hearing for the purpose of hearing submissions with respect to this matter, on the application of any of the parties affected by the order.

On notification that the parties were unable to agree upon the amount to be paid to Mr. McKee for lost wages and benefits, a telephone conference call was convened on July 8, 1992 in order that I might make directions for the conduct of the balance of the hearing. During the course of the conference call, counsel for the Respondents indicated that he wished to have Mr. McKee medically examined. Counsel for the Commission objected to this being done, and Mr. McKee supports this position. I requested written submissions from the parties with respect to this request.

In his submission to the Board, dated July 17, 1992, Mr. Hawkins, counsel for the Respondents referred to a letter, dated July 29, 1991, containing a medical report prepared by Mr. McKee's family physician. Brief reference to this report, which was not filed as an exhibit at the hearing, was made in the transcript of the proceedings held July 30, 1991, beginning at page 171, line 5.

At line 10 of the same page, referring to the report, the Board stated that:

> ... it might be best if we just proceed with the hearing at this time, but should anything arise later about the doctor's report we can deal with it at that time.

By letter dated March 8, 1991, Commission counsel wrote to counsel for the Respondents stating, in part:

> ... in reference to the remedy sought on behalf of Mr. McKee, I propose that we ask the board to determine the period of entitlement, the heads of damage, mitigation, and the amount of pre and post judgement interest and that we do the actual number crunching together and present a final amount to the board for his approval after he has made his determination.

The medical report of Mr. McKee's family physician, above referred to, states, in part, that in December 1990 Mr. McKee had become ill and was hospitalized. There was an indication that there were two medical problems that resulted from the illness, and, initially, Mr. Hawkins wished to obtain an order that Mr. McKee be examined by two medical specialists.

The medical report was said by counsel for the Respondents, in his letter of July 11, 1992, to raise the following issue of relevance to the amount of wages and benefits lost by Mr. McKee:

> If Mr. McKee had been a regular Hayes-Dana employee in 1990 and 1991, he would have received short term disability benefits beginning at some point of December 1990. For his first six months of disability, he would have received disability payments equal to his regular salary net of shift premium pay. However, if, as [the doctor's] report states, he remained totally disabled for his usual work by the end of July 1992, he would have begun to receive long term disability benefits at the

rate of 60% of his normal wage rate net of shift premium pay at some point in June 1991. [The Doctor] ... was unable to state how long Mr. McKee's disability would continue after July 29, 1991.

I am instructed under the Hayes-Dana disability benefit plan applicable to Mr. McKee, the concept of salary in the formula for calculating benefits both during the initial six-month disability period and during the following two years of disability, the concept of "salary" means salary net of any amount normally earned as a shift premium or for overtime work.

Neither Mr. McKee nor the Commission has provided the respondents with any information on his condition of total disability after July 29, 1991 when [the Doctor] ... prepared his report.

What the respondents wish to do is have Mr. McKee medically examined to determine the extent and possible duration of his condition of total disability. The respondents submit that this question is relevant to the issue of the quantum of lost wages and benefits given the nature of the Hayes-Dana long term disability plan and [the Doctor's] ... report.

In making this request for a medical examination, and if so advised, the right to lead evidence as to Mr. McKee's possible continuing total disability, the respondents are being fully consistent with the position taken by Commission counsel in her March 8, 1991 letter, with the observation and direction made by you at the hearing on July 30, 1991, and with your decision of April 22, 1991.

Further, there were good reasons for not raising the issue earlier. The respondents disputed that Mr. McKee had been the victim of discrimination on the basis of age. Until that issue was decided, the question of whether or not Mr. McKee was disabled following December 19, 1990 was not relevant. Secondly, the respondents submitted that if Mr. McKee had not left Hayes-Dana in August of 1985, he would have lost his job at Hayes-Dana in January of 1987 when the forge shop closed. This was an issue relevant to the period of entitlement. You did not accept this submission. However, if you had accepted that submission and had ruled that Mr. McKee was not entitled to compensation for lost wages and benefits after January of 1987, the question of how long Mr. McKee remained totally disabled after December of 1990 would have been irrelevant. There was therefore a potential saving in time in deferring this question until you determined both the question of liability and the

question of the period of entitlement, as contemplated by Commission counsel in her March 8, 1991 letter.

The respondents submit that if a medical examination is ordered in this proceeding as they request, neither Mr. McKee nor the Commission will be prejudiced in any way. It is still open to them to have Mr. McKee further examined by a health practitioner on his own behalf on the question of the duration of his total disability.

If the respondents are denied the opportunity of having Mr. McKee medically examined and of leading evidence on the question of total disability after July 29, 1992, they will be prejudiced. Such evidence may have the effect of reducing the compensation Mr. McKee is entitled to. By the very nature of the question of Mr. McKee's continuing disability, the respondents cannot properly develop that evidence without his cooperation, and a medical examination of him. This is the first medical examination of Mr. McKee they have requested.

In order to facilitate the examination, the respondents ask that you order that at least seven days before the examination, Mr. McKee provide to them the information set out in Rule 33.04(2) of the Rules of Civil Procedure, that is:

(a) any report (other than ... [that of Mr. McKee's physician] of July 29, 1991) made by a health practitioner who has treated or examined Mr. McKee in respect of the physical condition in question other than a practitioner whose report was made in preparation for contemplated or pending litigation and for no other purpose, and whom Mr. McKee and the Commission undertake not to call as a witness at this hearing; and

(b) any hospital record or other medical document relating to the physical condition of Mr. McKee in question other than a document made in preparation for contemplated or pending litigation and for no other purpose, and in respect of which Mr. McKee and the Commission undertake not to call evidence at this hearing.

The respondents contemplate having Mr. McKee examined by a [a physician in a named medical specialty] in Toronto or Hamilton. I am optimistic that we can arrange a date in August or September and a place that meets with Mr. McKee's convenience.

. . .

> If you direct that Mr. McKee may be examined on behalf of the respondents, you may also wish to provide for the exchange of medico-legal reports obtained by the respondents and any similar reports obtained on behalf of Mr. McKee or the Commission and that such reports be exchanged in advance of the October 16, 1992 hearing date.

Commission counsel, in her undated reply to the written submissions of counsel for the Respondents that Mr. McKee be medically examined, made the following arguments:

> 1. The respondents had full opportunity over the course of the proceedings to raise the medical report as an issue for mitigation, yet failed to do so. In requesting further medical evidence, the respondents are attempting to relitigate the issue of mitigation. In fact, to the complete surprise of the Commission Counsel, the respondents have only raised this request <u>for the very first time</u> during the recent conference call. To reopen the issue of mitigation would cause undue delay and prejudice the rights of Allen McKee. It would also constitute an abuse of process.
>
> 2. The Commission is prepared to provide an updated medical report from ... [Mr. McKee's family physician] if it will assist the respondents in making their submissions as to the actual dollar amount of the award.
>
> 3. Should the Board order that further medical evidence be considered, any such order should be in compliance with the <u>Code</u> and the <u>Ontario Human Rights Commission Policy on Employment-Related Medical Information</u>. Such evidence ought to be relevant to whether Allen McKee would have been able to perform the essential duties of some job (and we don't know which job he would now have with Hayes-Dana had his employment not been terminated) with accommodation short of undue hardship on the part of the Respondents. Such a process will indeed be very time consuming and in Mr. Hawkins own submission, only "might" reduce the amount of Allen McKee's compensation. These are further reasons why the Board should refuse this time consuming request.
>
> 1. <u>Reopening the Issue of Mitigation</u>

> The Commission agrees with Mr. Hawkins that the hearing proceeded according to Commission Counsel's proposal: ie that "we ask the board to determine.... mitigation".
>
> In fact the Board's order included legal conclusions regarding mitigation in paragraph 1 of the Board's order. The Board ordered compensation for lost wages and benefits from October 1, 1985 to the date of Mr. McKee's 65th birthday. Reconvening the hearing was for the purpose of "hearing submissions" with respect to the amount, not to lead new evidence of mitigation. ...

Further in her submissions, counsel for the Commission stated:

> During the course of the hearing, Commission Counsel advised the Board that it had requested a medical report to reflect the current status of Mr. McKee's health and consented to the recalling of Allen McKee by Mr. Hawkins should the report bring any new information to light. [Transcript, July 25, 1991, p.3] Mr. Hawkins made no submissions in that regard, nor did he seek to recall Mr. McKee for that purpose nor did he call any expert medical evidence at all which would suggest that Mr. McKee's wages and benefits ought to be reduced.
>
> When I provided the report and sought to tender it, the Board stated that the report could be tendered after the witnesses present were heard. [Transcript, July 30, 1991, p.171] If the respondents were interested in relying on this evidence, it was certainly open to them to request the tendering of the report. Also, Mr. McKee gave evidence of his medical condition. However, again the respondents chose not to rely on this evidence for the purposes of mitigation.
>
> The Board's direction to deal with the medical report later must be read in the context of the proceeding. Later meant during [sic] after the hearing of the witness' evidence and after Respondent [sic] Counsel had adequate opportunity to examine the report. However, the Respondents chose not to raise the issue of Allen McKee's health at all. In fact, the evidence we did hear from Mr. Yates was that there was nothing physically demanding required for the job of foreman to prevent one from continuing to work until age 65. [Transcript July 26, 1991, pp.56-57]

From the submissions of counsel for the Respondents, it appears that a meeting took place on May 21, 1992, at which time both counsel presented sets of figures with respect to the monetary compensation payable to Mr. McKee. Although there appears to have been some agreement on certain items, a number of items could not be agreed upon.

Counsel for the Commission further argued that:

> The effect of this request is, first, to reopen the merits of a matter already decided, and second, further delay a process which has already been lengthy. Contrary to the Respondents' submissions and in reference to the Commission's third submission, the reopening of the issue of mitigation will require a good deal of delay in order to be properly dealt with should the matter be reopened. This will prejudice Mr. McKee in finally having his rights under the Code remedied and he will continue to suffer from discrimination by the Respondent's because of the delay.

Counsel for the Commission also stated that:

> Should the Board order that the Respondent's request be met, the Commission requests that an order also be made that any medical examination conducted must comply with the terms of the Code and the Commission's policy on employment related medical information. As such, a full job demands assessment must also be undertaken of every position Mr. McKee might have occupied, as well as an assessment of what accommodation may be provided for Mr. McKee for each of those jobs to enable him to perform the jobs, bearing in mind the Respondent's duty to accommodate short of undue hardship. This will be an extremely lengthy process with only speculative results.

In his reply of August 20, 1992, to Commission counsel's submissions, counsel for the Respondents stated:

> The respondents are not attempting to re-litigate the issue of mitigation. This Board decided (at page 22 of

the Board's order) that Mr. McKee took reasonable steps to seek substitute or new employment after August of 1985, and that his compensation should not be reduced because of his limited success in finding new employment. The respondents will not be seeking to challenge that conclusion in the hearings which remain.

Counsel for the Respondents reiterated his position that:

> There is evidence in ... [the] .... existing report [of Mr. McKee's family physician] that Mr. McKee was totally disabled from December 1990 to July 1991. What the respondents wished to determine is whether he was totally disabled after July of 1991, and if so for how long. If he was totally disabled, this does not mean that he failed to act reasonably so as to mitigate his damages. Indeed, in the context of whether Mr. McKee acted reasonably so as to mitigate his damages, a condition of total disability would be a valid reason for not seeking a new job. Rather, the issue of total disability bears on the question of the pay and benefits Mr. McKee would have received had he remained a Hayes-Dana employee. If he had not been totally disabled, he would have received the regular salary and benefits for the Hayes-Dana position which he held. If he was totally disabled for a period in excess of six months, as a Hayes-Dana employee he would not have received his regular salary and benefits. Instead, he would have received long term disability benefits for a period of up to two years during which time he would receive an amount equal to 60% of the normal wages for the position which he held at Hayes-Dana.
>
> The respondents flatly deny that they are attempting to delay the conclusion of these hearings. The respondents have never requested that any of these hearings be adjourned. The first day of hearings lasted less than two hours. While the respondents did not object to this, it was not their idea that no testimony be heard that first day. On another day during the presentation of the Commission's case, proceedings were adjourned at noon because further witnesses were not available. By contrast, once the respondents began their case, each day of hearings was a full day until the respondents' evidence was completed, because the respondents always had witnesses ready to testify once a previous witness was finished.
>
> When it came to argument, the respondents were prepared to table an outline of their submissions in advance of January 3, 1992 supplemented by oral argument at that

> time. Commission counsel was not prepared to table such an outline. In the end, this Board directed that written argument be filed. Even then, the respondents were prepared to present their submissions orally on January 3, 1992, in order to speed matters up. Nevertheless, this Board directed the all submissions be made in writing. While this meant that the presentation of submissions was not completed on January 3, 1992, that was not something the respondents either wanted or requested.
>
> The respondents are not prolonging these proceedings beyond what is necessary. The respondents view the accusations made in Mr. McKee's complaint as serious ones, as they are. The compensation which Mr. McKee seeks is very substantial. There is the possibility of further claims from Mr. Adams and Mr. Liefl. If they present claims comparable to that presented by Mr. McKee. the respondents face an exposure in excess of $1,000,000.
>
> In my letter of July 17, 1992, I submitted why the issue of total disability and the request for a medical examination was not previously made. I also stated that if [Mr. McKee's physician] or some other relevant health care practitioner could confirm that Mr. McKee's [primary health problem] remains stable and well managed and that he had no further treatment for that or for [a secondary health problem associated with the first one], an examination by a [medical specialist in the area noted] would not be necessary. Neither Mr. McKee nor Commission counsel have provided such information or offered to do so unless that is implicit in Commission counsel's statement that the Commission is prepared to provide an up-dated medical report from [Mr. McKee's family physician]. Thus far, the respondents have received no such report. Providing such information quickly will speed matters up.

On August 24, 1992, counsel for the Commission wrote to me indicating that an updated medical report had been received from [Mr. McKee's family physician]. Counsel for the Commission also stated:

> The Commission has no knowledge of claims advanced against Hayes-Dana by other parties. Potential claims by potential litigants is a completely irrelevant consideration to the determination of whether the Board should order extensive medical examinations of Allen

McKee at this late date. Information submitted in regard to Messers Adams and Liefl is improperly before the Board and should be disregarded.

Counsel for the Commission added:

> [The] report [of Mr. McKee's family physician] was provided to the respondents with the consent of Allen McKee during the course of the hearing. The Commission, out of a duty of fairness, felt obliged to advise the Board and the respondents of Allen McKee's medical condition. At that time, the respondents chose not to act or rely on this information, nor did they seek to provide any expert evidence of their own during the presentation of their case, despite having been provided with the opportunity to so do. The respondents have offered no persuasive reason as to why they never once raised this issue until after the determination of the merits, nor as to why they have not provided any prior notice to Mr. McKee or the Commission until recently. Any prejudice alleged by the respondents has been self created.
>
> Mr. Hawkins submits that it is unfair for the Commission to rely on medical evidence without providing an opportunity to the respondents to call their own expert evidence. It is Mr. Hawkins who has now tendered and relied on the report of [Mr. McKee's family physician].
>
> The respondents have not undertaken to comply with the Code in seeking medical information. There is a big difference between a consensual undertaking offered by Allen McKee and the course of action that is suggested by the respondents. It is clear that the respondents' request is prompted by an interest to now reduce their liability, having unsuccessfully advanced other heads of mitigation. Their request is not motivated by a desire to see if they could accommodate Mr. McKee in a job at Hayes-Dana.

In his reply to Ms. Sanson's letter of August 24, 1992, counsel for the Respondents stated:

> This board of inquiry, in dealing with all remaining issues, should proceed on the basis that Hayes-Dana complies with the Code.
>
> In part, Commission guidelines deal with employment-related medical information on prospective new empoyees

> or continuing employees. Mr. McKee is not in either position. Nevertheless, any medical information obtained about him will be kept confidential.
>
> In part, the Commission guidelines also deal with the requirement to accommodate handicapped or disabled persons in the workplace. Hayes-Dana cannot yet tell what accommodation if any is involved the case of Mr. McKee once he is able to return to work until more about his medical condition is known. The immediate purpose of the request for medical information was to shed light on the question of whether he would have received total disability benefits rather than regular salary during part of the time period covered by this Board's ruling respecting compensation.
>
> In the light of [the] new report [of Mr. McKee's family physician], the respondents do not need to have Mr. McKee examined by a [physician in one of the specialties referred to].

Upon receiving a letter of September 28, 1992 requesting a further conference call to take place on Friday October 2, 1992, at 9:30 a.m., such a call was arranged to deal with:

1. The possibility of re-convening the hearing in Toronto rather than St. Catharines and;
2. To deal with a request for an adjournment proposed by the Respondents.

Part of the basis for the request for the adjournment is set out in a letter from counsel for the Respondents to counsel for the Commission, dated September 11, 1992:

> When may I expect the outline of Mr. McKee's claim that Chairperson Gorsky directed the commission file by August 31, 1992? I do not want to lose our October hearing dates. May I hear from you as soon as possible.

In her letter of September 14, 1992 to counsel for the Respondents, counsel for the Commission stated:

> I direct your attention to page 5 of my submission in regard to your request for a medical examination:
>
> > The Commission also requests that the Board change the deadline for the Commission's notice of the amount of the award from September 1, 1992 to 10 days after receipt of the Board's decision on this issue. The decision will have a direct bearing on the items the Commission will submit should the Board decide to reopen the issue of mitigation.

On September 16, 1992 counsel for the Respondent replied to counsel for the Commission's letter of September 14, 1992:

> The board has not extended the time for delivery of the outline of Mr. McKee's claim. As I understand matters, he does not concede that his medical condition would in any way adversely effect his claim. I see no reason why the outline of his claim cannot be delivered immediately. and a response to any defence claim that his income would have been reduced to total disability benefits for a period of time delivered after the outline of the defence position is delivered.

On September 16, 1992, counsel for the Commission replied to the letter of September 16, 1992 from counsel for the Respondents:

> As I understand matters, the Board does not refuse my request to extend the deadline. Under the circumstances, I believe my request is a reasonable one. I reiterate that perhaps you should inquire in writing to the Board as to when we might expect his decision on these issues.

The final response of counsel for the Respondents is contained in his letter of September 28, 1992 to Commission counsel:

> Unless I receive an outline of Mr. McKee's claim by October 2, 1992, I do not see how I can proceed with the hearings scheduled for October. Depending on how the

> claim is advanced, I may still have to request an adjournment even if I receive the outline by October 2, 1992. The position that you have taken means that you have months to prepare your claim while I have days to respond. That is simply not acceptable.

As noted above, the determination of the amounts payable to Mr. McKee is complicated by a number of matters that arose subsequent to his leaving his employment with Hayes-Dana. Commission counsel does not regard any of these matters as being relevant to my assessment of Mr. McKee's monetary compensation. Can the Board ignore facts that arise prior to the making of its final decision that are relevant to the issue of Mr. McKee's actual loss?

After having found: (1) that the Respondents had discriminated against Mr. McKee because of age, contrary to the provisions of s.4(1) of the Code, and (2) that the Respondents had infringed Mr. McKee's rights under Part I of the Code, contrary to the provisions of section 8, the Board made its order pursuant to s.40(1) of the Code, the relevant portion of which is as follows:

> Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 8 by a party to the proceeding, the board may, by order, ...
>
> (b) direct the party to make ... monetary compensation, for loss arising out of the infringement, and where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award not exceeding $10,000, for mental anguish.

In this case, the Board decided that Mr. McKee would, but for the discriminatory actions of the Respondents, have remained an employee of Hayes-Dana until he reached the retirement age of 65 in 1993. There were a number of possible orders with respect to monetary compensation that were open to the Board. Cf. Mears v. Ontario Hydro (1983), 5 C.H.R.R. D/1927 (Ont. Bd. of Inquiry), where it was decided that the complainant should only receive compensation for lost wages for a limited period of time. In the Ontario Hydro case, however, the board noted, at para. 16608: "There was no evidence which indicated that there were any special circumstances as to why [the complainant] should have had difficulty finding comparable employment to that which he had [previously held]." Also, there was no evidence: "... as to what attempts [the complainant] made to seek other employment," and the board was of the opinion: "... that a reasonably foreseeable time to obtain other employment [was] 12 weeks ... ."

In this case, the Board found that Mr. McKee did what was reasonable to mitigate his loss. Also, given the nature of his training and experience, and taking into consideration his age, the Board decided that the purposes of the Code would be best served by awarding compensation based on the conclusion that he would, but for the violation of the Code, have remained in the employment of Hayes-Dana until his normal retirement date.

In Piazza v. Airport Taxi Cab (Malton) Assn. (1986), 7 C.H.R.R. D/3196 (Ont. Bd. of Inquiry) varied (1987) 24 Admin. L.R. 149, 9 C.H.R.R. D/4548, 24 O.A.C. 8 (Div. Ct.), reversed (1989) 69 O.R. (2d) 281 60 D.L.R. (4d) 759, (sub nom. Airport Taxi Cab (Malton) Assn. v. Piazza 10 C.H.R.R. D/6347), the board awarded 11 weeks wages to an employee with 4 years' experience who had been employed by the respondent for only two and a half months at the time of her dismissal. The Divisional Court, on appeal, reduced the award, stating that the appropriate guideline for compensation should be that used in wrongful dismissal cases: reasonable notice. In restoring the order of the board, the Court of Appeal, per Zuber, J.A. stated (at 10 C.H.R.R.) paras.45016-45018) :

> 45016 In wrongful dismissal cases the wrong suffered by the employee is the breach by the employer of the implied contractual term to give reasonable notice before terminating the contract of employment. Damages are awarded to place the employee in the same position as he/she would have been had reasonable notice been given.
>
> 45017 Section 19(b) of the Ontario Human Rights Code which governed this case provides as follows:
>
> > 19. The board, after hearing a complaint,
> >
> > (b) may order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor.
>
> As will be seen, this section simply empowers the board to order compensation. The purpose of the compensation is to restore a complainant as far as is reasonably possible to the position that the complainant would have been in had the discriminatory act not occurred. I find nothing in the language of the foregoing section which would import into it the limit on compensation which is imposed by the common law with respect to claims for wrongful dismissal.

45018 Professor D.A. Soberman, sitting as a board of inquiry under the Human Rights Code had occasion to consider this issue in Whitehead v. Servodyne Canada Ltd. (1987), 8 C.H.R.R. D/3874. Professor Soberman discussed at some length the difference between the remedy for wrongful dismissal at common law and the remedies available under human rights legislation. In para. 30689, he concluded as follows:

> If this reasoning is sound, then the usual measure of economic loss in contract law for wrongful dismissal - lost wages during a period of reasonable notice - is not the correct measure to compensate an aggrieved complainant under the Human Rights Code. While there may be circumstances where the quantum of damages for wrongful dismissal in contract coincide with the compensation for breach of section 4(1) of the Code, such circumstances are merely fortuitous. More often the contract measure will be inadequate to compensate the complainant and also to carry out the purposes of the Code.

With respect I agree with this conclusion.

The amendment of the Code providing that the board may order the payment of monetary compensation as is provided in s.40(1)(b) does not change the conclusion referred to in the Piazza case.

The Board is mindful of the limits imposed upon it in awarding compensation to be paid under the Code. In Underwood v. Board of Commissioners of Police of Smiths Falls (1986), 7 C.H.R.R. D/3177 (Ont. Bd. of Inquiry) the chairman, dealing with compensation to be paid under the Code, stated, in part (at D/3184):

> In my view, a board if inquiry under the Ontario Human Rights Code has not only the power, but the responsibility to determine actual loss and order true compensation...
>
> With respect, in my opinion, the obligation to provide true compensation has little to do with the avoidance of trivialising, or diminishing respect for, the public

> policy declared in the Code. It is not as though but for that policy the obligation would be to under-compensate for actual losses arising out of the infringement, or as though because of that policy the obligation is to over-compensate for such losses. ...
> (emphasis in original)

The Board is also aware of the limitations placed on human rights tribunals: that it is not their function to assess punitive or aggravated damages, although s.40(1)(b) allows for an order for monetary compensation for mental anguish, not exceeding $10,000, "where the infringement has been engaged in wilfully or recklessly." Thus, a board of inquiry must attempt to determine actual loss and order true compensation ... ." In its decision of April 22, 1992, the Board was concerned with deciding two issues: the first being whether the Respondents had discriminated against Mr. McKee on the basis of age with the result that his career with Hayes-Dana came to an end, and the second being whether he had, in all the circumstances, done what was reasonable to mitigate his losses. The Board recognized that a great deal of additional time would be taken up in an already lengthy hearing if it heard evidence on a number of complex issues relating to monetary compensation before deciding whether there had been a violation of the Code which would enable it to award such compensation. After having found in favour of Mr. McKee on the above mentioned two issues, the Board referred the issue of monetary compensation to the parties to see whether it might be the subject of agreement. As the parties were unable to settle the issue of compensation, the matter was returned to the Board to set dates for hearing.

In endeavouring to restore Mr. McKee "as far as is reasonably possible to the position that [he] would have been in had the discriminatory act not occurred," the Board must focus on his "actual loss." Failure to consider facts that occurred from August 16, 1985, when his career with Hayes-Dana ended, to the date of assessment, would ignore evidence that might be relevant to calculating his actual loss. If such evidence is not considered, there is a danger of the Board over-compensating Mr. McKee for monetary loss arising as a result of the infringement.

Ms. Sanson suggested that for the Board to allow the medical examination requested by Mr. Hawkins would have the effect of reopening the issue of mitigation that has been already decided. This issue has been decided, and I do not understand that it is Mr. Hawkins' intention to try to reopen it, nor would I permit him to do so. The request made by Mr. Hawkins may be relevant to the determination of Mr. McKee's actual loss, and is unrelated to whether he mitigated his damages. Mr. Hawkins indicated that, on the basis of the medical evidence, he may endeavour to establish that Mr. McKee would not have been able to work for some period, but would have been paid pursuant to a disability plan maintained by Hayes-Dana. Without medical evidence, Mr. Hawkins would be unable to make his argument with any hope of success. I reiterate, Mr. Hawkins' request can in no way affect the Board's earlier ruling that Mr. McKee did everything reasonable to mitigate his damages. He should not, however, be able to claim monetary

compensation at the rate he would receive when working, if the evidence discloses that he would, during a relevant period, be paid a percentage of his working rate, as when he would have been paid under a policy of disability insurance maintained by Hayes-Dana.

Ms. Sanson also regarded Mr. Hawkins' claim as being too conjectural in nature for the Board to rule upon it. The Board's task will, however, not be much different from that of a court that has to rule upon certain claims that are, in principle, the same as the one being raised by Mr. Hawkins. For example, in assessing a plaintiff's actual loss, after awarding her judgment against her solicitor who was negligent in failing to commence an action within a relevant limitation period, as a result of which an earlier action for damages brought by the plaintiff was dismissed, the court does not automatically give judgment for the full amount claimed. The court must consider whether the original action would likely have succeeded if it had been heard on its merits. Notwithstanding the solicitor's negligence, the court still might conclude that the claim would have failed for other reasons, or that damages would have been assessed in an amount less than that claimed. There is no reason why a board of inquiry cannot make a decision based on the same principle in arriving at the actual loss suffered by a complainant.

The situation of a complainant, such as Mr. McKee, is also, in another respect, similar to that of a plaintiff seeking assessment

of damages in the case of a continuing cause of action. If this was a case before the courts, facts bearing upon assessment could be considered to the time of the assessment. Section 117 of the Courts of Justice Act provides:

> Where damages are to be assessed in respect of, ...
>
> (a) a continuing cause of action; ...
>
> the damages, including damages for breaches occurring after the commencement of the proceeding, shall be assessed down to the time of the assessment.

The above provision was in the original Courts of Justice Act, at S.O. 1984 c.11 and renumbered by R.S.O. 1990. The section is derived from the Rule 259, which does not appear in the new Rules cf. East Middlesex (Dist.) High School Bd. v. London Bd. of Education, [1965] 2 O.R. 51 C.A., affirmed [1967] S.C.R. 49. Although section 117 does not apply to these proceedings, by analogy it provides a fair method of assisting a board to assess a complainant's actual loss.

In the result, Mr. Hawkins ought to be given a reasonable opportunity of pursuing his argument relating to the assessment of the amount of compensation payable to Mr. McKee based on the "total disability issue" raised by him in his letter of July 17, 1992.

Mr. Hawkins' request is now limited to one to have Mr. McKee examined by a [single physician in a named specialty] in Toronto or Hamilton. In granting the request for such an order, I am also allowing the request of Ms. Sanson that Hayes-Dana pay to Mr. McKee

reasonable amounts to cover transportation costs, meals and lodging associated with the examination, and that all costs associated with the examination be the responsibility of the Hayes-Dana.

I believe that it should be possible for the parties to agree on the specialist to examine Mr. McKee. In the event that one of them informs me that they are unable to agree, I will have to make the appointment. It is imperative that the examination take place as soon as possible, and the choice of the examining physician should not overlook the need to have the examination concluded and the report completed without much more delay.

I also order that, at least seven days before the examination, Mr. McKee provide Mr. Hawkins with the information set out in Rule 33.04(2) of the Rules of Civil Procedure, as requested in Mr. Hawkins' letter of July 17, 1992.

Mr. Hawkins intends to try to establish "how long Mr. McKee remained totally disabled after December of 1990" (see his letter of July 17, 1992). At this time I do not wish to anticipate other issues that may not actually arise in relation to the assessment of compensation payable to Mr. McKee. I am hopeful that with the receipt of the medical evidence, the parties will be able to resolve most, if not all, of their differences.

In accordance with Mr. Hawkins' suggestion contained at p.5 of his letter of July 17, 1992, I also order that the parties "exchange ... any medico-legal reports obtained" by them in advance of the next hearing date to be scheduled.

In dealing with the remaining issues, the Board is satisfied, based on Mr. Hawkins' undertaking contained in his letter of September 2, 1992, that the Respondents will comply with the requirements of the Code. I refer to Mr. Hawkins' undertaking that "any medical information obtained about him will be kept confidential."

As the "immediate purpose of the request for medical information [is] to shed light on the question of whether [Mr. McKee] would have received total disability benefits rather than regular salary during part of the time period covered by [the] board's ruling respecting compensation," it is premature to get into the question of what accommodation if any will be involved.

Once the medical examination has been obtained, at the request of either of the parties, I will immediately set sufficient continuation dates so as to enable this matter to be completed without further lengthy delays. If necessary, I will schedule Saturday hearings in Toronto (the parties having agreed to Toronto as the venue), and will give this matter priority so that a decision can be rendered soon after the hearing is completed.

Because of the time that it will take to complete the medical examination and obtain and consider the report, it will be necessary to cancel the dates set for the continuation of the hearing on October 16 and 22, 1992.

Dated at Toronto this 9th day of October, 1992.

M. R. Gorsky
Board of Inquiry